CONSTITUTIONAL SIGNIFICANCE OF THE PHRASE "TAKING OF PROPERTY."

It is clear that to form a proper conception of what constitutes a "taking" of property for public use within the meaning of the provisions in most of the State constitutions the true meaning of "property" must be clearly defined.[1] If it is to be understood as the corporeal thing over which dominion is exercised by the owner, it follows that nothing but a physical deprivation in whole or in part will be considered a taking of it. This conception in fact seems to be the basis of some cases;[2] but such a narrow and extreme view was to some extent repudiated by the decisions giving compensation for the destruction of easements[3] and other incorporeal rights.[4] A further step has been taken in many jurisdictions in the cases which proceed upon the theory that when one party has acquired in the land of another an easement, which is admittedly a property right, whatever was subtracted from the *dominium* of the second must likewise be property. Even, then, if no easement be destroyed, compensation must be given.[5]

It is difficult, indeed, to find theoretical support for any different result. Since the earliest times it has been recognized that "property" does not consist in the thing itself, be it land, or chattel, or incorporeal hereditament but stands for the sum of the rights which the owner may lawfully exercise with reference to that thing.[6] The ownership of land, for instance, is said to be made up of the rights of user, exclusion, disposition and others less important;[7] and indeed it would hardly be denied that a deprivation of these rights *in toto,* though it left bare title, would be an invasion of property. It seems, then, to follow inevitably that a partial encroachment upon any of these property rights is as clearly a "taking" of property as is the taking of a strip of the land itself. The distinction based upon the fact that the land is susceptible of physical division and occupation is purely superficial, for the total of the owner's property is as plainly diminished in the one case as in the other. The contrary doctrine logically leads to the extraordinary result that by successive encroachments the State could gradually strip off every beneficial right which makes ownership more than a name, leaving, perhaps, only a last scintilla of interest to persuade the victim that there had been no "taking" of his property.[8] In accordance with the foregoing principles, hesitatingly suggested in 1857 by an eminent text writer,[9] and first conspicuously applied in 1872,[10] it has repeatedly been decided that any physical occupation of land, as for example by sand or gravel or water, amounting to a serious interruption of its common and necessary use, is a "taking" requiring compensation.[11] But it is submitted that this doctrine cannot logically

[1]Lewis, Eminent Domain, (3rd ed.) 62.

[2]Hurt *v.* Atlanta (1896) 100 Ga. 274, 280.

[3]Arnold *v.* Hudson River R. R. (1873) 55 N. Y. 661.

[4]Thompson *v.* Androscoggin Co. (1874) 54 N. H. 545, 552; Ladd *v.* Boston (1890) 151 Mass. 585, a case of restrictive covenants.

[5]Eaton *v.* B. C. & M. R. R. (1872) 51 N. H. 504, 515, the leading case on the subject.

[6]See 1 Bl. Com., 138.

[7]1 Lewis, Eminent Domain, (3rd ed.) 52.

[8]See Eaton *v.* B. C. & M. R. R. *supra.*

[9]Sedgwick, Constitutional Law, (2nd ed.) 462-463.

[10]Eaton *v.* B. C. & M. R. R. *supra.*

[11]Pumpelly *v.* Green Bay Co. (1871) 13 Wall. 166; Booming Co. *v.* Jarvis (1874) 30 Mich. 308.

be limited to a physical encroachment, which is as far as some cases have gone.[12] If an invasion by water or sand be considered a "taking," it can only be because it is a deprivation *pro tanto* of the right of user, for it takes neither title nor possession, and destroys no other right. The conclusion then seems inevitable that to whatever extent these property rights are abridged, whether by a physical invasion of the land falling short of divesting the title,[13] or by an actionable nuisance falling short of a physical invasion,[14] property is *pro tanto* taken, and the public should not escape giving compensation for the benefit it receives.[15] An application of these principles will justify the decision in the recent case of *Badouh* v. *St. Louis, B. & M. Ry. Co.* (Tex. 1911) 140 S. W. 354. Evidence was sought to be introduced as to a marked increase of user by the defendant company of its tracks in front of the plaintiff's house, on the ground that the latter was entitled to compensation for the resulting great decrease in the value of his property. In the ruling that such evidence was inadmissible, the trial court not only clearly departed from the correct theory of property but violated the local constitutional provision against "damaging" for public use,[16] enacted, doubtless, to prevent the harsh consequences of just such error. On both grounds, the reversal is clearly to be supported.

So plain are the principles leading to the conclusion herein advocated, and so apparent is its fairness, that it is difficult to justify on any ground the refusal to adopt it. But it should be borne in mind that the chief occasions for the exercise of eminent domain, in early days, were public improvements such as highways, which affected the usability of land not actually occupied by them far less than railways and other great modern enterprises, and the law seems sometimes reluctant to expand even if the expansion be logical. There are other cases, however, based on the idea that a nuisance committed by virtue of a legislative fiat cannot be a "taking"—that the legislature may "legalize" a nuisance.[17] But it seems obvious that in this country, unlike England, a statute affords no justification for an act otherwise tortious, unless it in turn conforms to the organic law.[18] It may relieve a public wrong of criminal consequences,[19] but it cannot justify the refusal of damages for the invasion of a property right.[20]

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[12]See Pumpelly *v.* Green Bay Co. *supra.*

[13]Pumpelly *v.* Green Bay Co. *supra.*

[14]Chicago G't Western Ry Co. *v.* Church (1900) 102 Fed. 85; Baltimore R. R. Co. *v.* Sattler (1905) 100 Md. 306; and *cf.* City of St. Louis *v.* Hill (1893) 116 Mo. 527; U. S. *v.* Alexander (1892) 148 U. S. 186.

[15]See Sedgwick, Constitutional Law, (2nd ed.) 463; Lewis, Eminent Domain, (3rd ed.) 56 *et seq.* It should be noted, however, that a purely technical injury, since it actually abridges no substantial right, does not diminish the owner's property, Winslow *v.* Gifford (Mass. 1850) 6 Cush. 327; and see Lewis, Eminent Domain, (3rd ed.) 58. An imposing array of authority apparently opposed to the above views may similarly be reduced by a careful analysis of the cases. See Eaton *v.* B. C. & M. Ry. *supra,* 523 *et seq.*

[16]Constitution of Texas, Art. 1, § 17.

[17]See Lewis, Eminent Domain, (3rd ed.) 457; Eaton *v.* B. C. & M. R. R. *supra,* 516.

[18]See Eaton *v.* B. C. & M. R. R. *supra,* 516.

[19]Thompson *v.* Androscoggin Co. *supra,* 555.

[20]Blanc. *v.* Murray (1884) 36 La. Ann. 162, 165; Chicago, G't. Western Ry. *v.* Church *supra,* 91.